50437-5-II

NO. 92992-1

SUPREME COURT OF THE STATE OF WASHINGTON

RAINIER XPRESS, TRIPLE C COLLECTIVE, LLC, and GREEN COLLAR CLUB,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

Joshua Weissman, WSBA No. 42648
Assistant Attorney General
David M. Hankins, WSBA No. 19194
Senior Counsel
Revenue and Finance Division
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528
OID No. 91027

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I. INTRODUCTION

A business cannot avoid collecting and remitting retail sales tax by asking its customers to make "contributions" in exchange for providing goods. The businesses in this case received money in exchange for providing marijuana, which was the exchange of valuable consideration for personal property. They are not entitled to a refund of retail sales tax on the ground that no retail sales occurred.

Their medical marijuana sales between 2011 and 2014 also were not exempt from sales tax on the ground that they were prescription drug sales. Prescription drug sales are exempt from sales tax, as are medicines prescribed by naturopaths. But a medical authorization indicating that a person might benefit from the use of medical marijuana does not meet the statutory elements for the prescription drug exemption because it is not an "order, formula, or recipe." In addition, marijuana does not constitute a prescription drug because it is a schedule I controlled substance that is not legal to prescribe. For the same reason, it is not a medicine prescribed by a licensed naturopath. The trial court correctly denied the businesses' claims for a refund of taxes paid.

II. STATEMENT OF ISSUES

1. The businesses in this case received money from customers and provided them marijuana. Did the businesses exchange personal

property for valuable consideration, and therefore engage in "retail sales" subject to the retail sales tax?

2. Under the medical marijuana law, practitioners provide an authorization to a qualifying individual stating that the person *may* benefit from marijuana. Did the trial court correctly rule that this equivocal statement is not an "order, formula, or recipe," and therefore not a "prescription" exempt from sales tax as a prescription drug?

3. Marijuana is a schedule I controlled substance that a practitioner cannot legally prescribe. Did the trial court correctly rule that marijuana is not exempt from sales tax as a prescription drug?

4. For the same reason, naturopaths cannot legally prescribe or use marijuana in their practice. Did the trial court correctly conclude that marijuana is not a tax exempt medicine prescribed by naturopaths?

III. STATEMENT OF FACTS

A. The Medical Marijuana Businesses In This Case

This consolidated action involves three medical marijuana businesses (sometimes referred to as "dispensaries" or "collective gardens"). The relevant time period varies, but when viewed as a whole, it runs from 2011 to 2014 (sometimes referred to as the "tax period"). During the tax period, two of the businesses, Green Collar Club and Triple

C Collective, were located in Tacoma. The other, Rainier Xpress, was located in Olympia.

The issues in this case began to arise in 2011. That is when Washington enacted a statutory provision providing for "collective gardens." It is also the year when the Department of Revenue issued a Special Notice advising businesses engaged in the retail sale of marijuana that they would need to collect and remit retail sales tax. CP 682.

Each of the businesses had a physical location similar to any other retail store. *See* CP 319, 336 (each listing a physical address). The businesses were located in commercial areas. When a customer (also known by the businesses as a "patient," "qualifying patient," or "member") entered the store to buy (or "contribute" money) in exchange for marijuana, the businesses ascertained whether the individual had the legally required authorization from a medical doctor or other licensed provider. *E.g.*, CP 627. After a customer first presented these credentials, they were entered into an electronic database known as MMJ. *Id.*

The businesses made marijuana available by providing "menus" of different types of marijuana to customers, which had prices for particular products by weight (sometimes referred to as "suggested donation" amounts). CP 604-617 (different menus or lists received in discovery). Customers then purchased (or "donate[d]" or "contribute[d]") money in

exchange for the marijuana. CP 321, 338, 467-68. One of the companies, Rainier Xpress, acknowledges that it sold marijuana. Appellants' Br. at 6. The other two businesses, Green Collar Club and Triple C Collective, claim that money was provided as "contributions" by "members" of the collective. CP 320-21, 337-38. The businesses kept some accounting records. For example, one business recorded the total amount of merchandise sales, and another kept profit and loss statements. CP 672-80.

B. Background On Marijuana In Washington

In 1998, Washington voters adopted Initiative 692, commonly referred to as the medical marijuana law. Laws of 1999, ch. 2, codified at RCW 69.51A. Initiative 692 did not "legalize medical marijuana," but rather provided an affirmative defense against what would otherwise be criminal offenses for medical marijuana production, possession, and use.[1] *Former* RCW 69.51A.040(2)-(3) (2010); *see also State v. Reis*, 183 Wn.2d 197, 204, 351 P.3d 127 (2015).

Initiative 692 did not create a tax exemption for marijuana. CP 579-82 (Initiative 692). Neither the measure nor its description in the Voters' Pamphlet even mentioned taxes. *Id.*; CP 599-602 (Voters

[1] Washington's criminal laws concerning marijuana date from 1971, when the Washington Legislature enacted the Uniform Controlled Substances Act, RCW 69.50. That statute made it a crime to manufacture, deliver, or possess marijuana. RCW 69.50.401-.445. As recounted in text, those laws as they relate to medical marijuana have evolved in recent years. The Washington Supreme Court reviewed the history of medical marijuana in *Cannabis Action Coal. v. City of Kent*, 183 Wn.2d 219, 351 P.3d 151 (2015).

Pamphlet for Initiative 692 (Nov. 1998)). Indeed, the Initiative did not authorize the commercial sale of medical marijuana, and therefore there was no need to address the taxation of any such sales.

To qualify for the affirmative defense, a person had to meet the definition of a being a "qualifying patient." *Former* RCW 69.51A.010(4)(a)-(e) (2010). The patient had to be a Washington resident diagnosed with a terminal or debilitating medical condition by a Washington licensed health care professional. *Id.* The health care professional advised the patient of the benefits and risks of the medical use of marijuana. *Id.* The licensed health care professional provided authorization to possess marijuana by giving the patient a signed statement known under the statute as "valid documentation," which indicated that "in the health care professional's professional opinion, the patient [could] benefit from the medical use of marijuana." *Former* RCW 69.51A.010(7)(a) (2010). The patient could not have more than a sixty-day supply. *Former* RCW 69.51A.040(3)(b) (2010). If all of these conditions were satisfied, the qualifying patient could assert an affirmative defense against a criminal prosecution for possession of marijuana.

The law has continued to evolve. In 2011, the Legislature passed a bill amending Initiative 692 to create a comprehensive regulatory scheme under which all patients, physicians, processors, producers, and dispensers

could be securely and confidentially registered in a database maintained by the Washington Department of Health. Laws of 2011, ch. 181, § 901 (later vetoed). But Governor Gregoire vetoed 36 of the bill's 58 sections, including those creating a system of state registration. *See id.* at §§ 1374-76 (Governor's veto message). The Governor did not veto parts of the bill that authorized "collective gardens" and clarified that local jurisdictions retain their zoning power over medical marijuana activities.[2]

In late 2012, the voters approved Initiative 502, which permitted the legal purchase and sale of marijuana under Washington law for the first time, under certain conditions, and did not require medical authorization to purchase. Laws of 2013, ch. 3.[3] The Initiative created significant excise taxes for activities related to marijuana at the production, distribution, and retail sale levels, in addition to the already existing retail sales tax. Laws of 2013, ch. 3 § 27. This approval of recreational sale of marijuana in Washington created parallel systems for recreational and medical marijuana.

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[2] Other changes were made to the medical marijuana laws in 2007 and 2010.

[3] Initiative 502, which was enacted in the middle of the tax period for Green Collar Club, also defines a "prescription" consistent with the Department's interpretation of the separate definition of the prescription drug sales tax exemption. Initiative 502 defined a prescription as "an order for controlled substances issued by a practitioner duly authorized by law or rule in the state of Washington to prescribe controlled substances within the scope of his or her professional practice for a legitimate medical purpose." Laws of 2013, ch. 3, § 2(dd)

In 2014, the Legislature amended the definition of "drug" in the retail sales tax statute, RCW 82.08.0281(4)(b), to expressly exclude marijuana from a tax exemption for prescription drugs:

> (b) "Drug" means a compound, substance, or preparation, and any component of a compound, substance, or preparation, *other than* food and food ingredients, dietary supplements, or alcoholic beverages, marijuana, useable marijuana, or marijuana-infused products . . . .

Laws of 2014, ch. 140, § 19 (first emphasis added). In other words, the new statute specifically identified and excluded marijuana as not eligible for the prescription drug sales tax exemption. This was a clarification to prior law likely in response to arguments that sales of medical marijuana were exempt prescription drug sales.

In 2015, after the tax period in this case, the Legislature accomplished what the Governor's veto deleted from the 2011 act, creating a comprehensive regulatory scheme for the medical use of marijuana and merging it with the regulatory structure for recreational marijuana. Laws of 2015, ch. 70. It created a medical marijuana authorization database and recognition card. *See id.* at §§ 17, 19. Licensed retail stores may now sell medical marijuana in addition to recreational marijuana if they meet certain conditions. *Id.* at § 10. For the first time, the authorization from the health care professional will include the "amount of marijuana recommended for the qualifying patient . . . ." *Id.* at § 18.

Notably for this case, the Legislature made clear in 2015 that authorizations for the use of medical marijuana are not prescriptions. *See id.* at § 17 ("[a]n authorization is not a prescription as defined in RCW 69.50.101."); *see also* Laws of 2015, 2d Spec. Sess., ch. 4, § 101(b) (intent section of related legislation emphasizing that it is "imperative to distinguish that the authorization for medical use of marijuana is different from a valid prescription provided by a doctor to a patient"). This new regulatory scheme went into effect on July 1, 2016.

In conjunction with overhauling the medical marijuana scheme, the Legislature for the first time created an entirely new section exempting qualifying sales of medical marijuana from the retail sales tax. Laws of 2015, 2d Spec. Sess., ch. 4, § 207 (adding a new section to RCW 82.08). Medical marijuana, however, is still subject to a significant excise tax rate that exceeds the retail sales tax rate. Although medical marijuana sales under the conditions described below are now exempt from the State's 6.5% retail sales tax, the Legislature provided no exemption for medical marijuana retail sales from the marijuana excise tax. That tax is currently 37% of the selling price. RCW 69.50.535(1)(a).

The new sales tax exemption applies only to specific qualifying individuals and specific types of marijuana. Effective July 1, 2016, marijuana and marijuana products beneficial for medical use can be sold at

retail exempt from retail sales tax, if purchasers meet the requirements for medical use, including registration in a database. Laws of 2015, 2d Spec. Sess., ch. 4, § 207; *see also* WAC 246-70-040 (Department of Health determination of which strains of marijuana comply with medical marijuana laws).

Consistent with this statement that authorizations are not prescriptions, the Legislature created a new section in RCW 82.08 for the new medical marijuana exemption, rather than addressing it in the prescription drug exemption, RCW 82.08.0281. Laws of 2015, 2d Spec. Sess., ch. 4, § 207 ("[a] new section is added to chapter 82.08 RCW . . .").

C. Procedural Background

The three businesses in this case seek refunds for sales taxes paid. Each of the businesses remitted sales tax to the Department of Revenue for a period of time, but then stopped. Green Collar Club claimed a refund for $163,196.05 paid in sales tax for transactions between April 2011 and June 2014. CP 6-7. Triple C Collective claimed a refund for $31,310.10 paid in sales tax for transactions between July 2011 and July 2012. CP 1021-22. Rainier Xpress sought a refund for $53,885.60 paid in sales tax for transactions between February 1, 2012 through September 30, 2012. CP 95-96. All three businesses claim that they did not collect sales

tax from customers, but rather paid sales taxes out of their own proceeds.[4] The businesses submitted refund requests to the Department for the amount of tax they paid. The Department reviewed records pertaining to the businesses, and denied the refunds. *See, e.g.*, CP 683-702. Department auditors reviewed the records of the businesses, and concluded that the businesses had been engaging in the retail sale of tangible personal property and owed sales tax. *Id.*

The three businesses sued in Thurston County Superior Court for a tax refund under RCW 82.32.180. CP 6, 95, 218. The superior court consolidated the three refund suits. CP 307-09. Plaintiffs raised three claims. The first claim, raised by two of the businesses, asserted that they did not sell marijuana, and therefore incorrectly paid the Department retail sales tax out of their proceeds. The second and third claims, raised by all three businesses, argued that marijuana is exempt from sales tax because it is a prescription drug, and a medicine that is prescribed by naturopaths.

After some limited discovery, the parties filed cross-motions for summary judgment. The trial court granted summary judgment to the Department on all three issues, and denied summary judgment to the taxpayers. CP 963-965. Appellants seek direct review by this Court.

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[4] If the Court determines that any of the taxpayers' legal arguments has merit, plaintiffs would still have to prove that they did not collect any of the sales tax sought as a refund. If any of the businesses' customers did in fact pay sales tax, those customers, rather than the businesses, would be entitled to refunds of sales tax. *See* RCW 82.08.050.

IV. ARGUMENT

Appellants sold marijuana, which is tangible personal property subject to the retail sales tax. Neither the exemption for prescription drugs nor the exemption for medicines prescribed by naturopaths applies. Because marijuana is a schedule I drug under federal and Washington law, neither medical doctors nor naturopaths are legally permitted to prescribe marijuana. Nor is there any evidence whatsoever that the Legislature intended to extend the sales tax exemption for prescription drugs (which preceded Initiative 692) to marijuana during the tax period, and the citizens' initiative creating an affirmative defense to medical marijuana makes no mention of creating a tax exemption.

A. The Medical Marijuana Businesses Sold Marijuana At Retail, And Those Sales Are Subject To Washington's Sales Tax.

Washington imposes a sales tax on all sales of tangible personal property in this state to all persons irrespective of their business, unless the specific sales are exempt. RCW 82.08.020; RCW 82.04.050. A "sale" is "any transfer of the ownership of, title to, or possession of property for a valuable consideration . . . ." RCW 82.04.040(1). The tax is imposed on the buyer, but the seller is secondarily liable if it does not collect and remit the tax. RCW 82.08.050; *Home Depot USA, Inc. v. Dep't of Rev.*, 151 Wn. App. 909, 916-17, 215 P.3d 222 (2009).

The State imposes a tax of 6.5% on "the selling price" of such sales. RCW 82.08.020(1). The "selling price" or "sales price" includes "the total amount of consideration" for which such property is sold, "whether received in money or otherwise." RCW 82.08.010(1)(a)(i). No deduction is made for the seller's cost of property, the cost of materials or labor, or other charges by the seller. *Id.*

One of the appellants, Rainier Xpress, acknowledges that it sold marijuana. Appellants' Br. at 6. But the other two appellants, Green Collar Club and Triple C Collective, assert that they did not sell marijuana. *Id.* at 4. Even accepting these businesses' description of the facts about how their businesses operated, the trial court correctly rejected their erroneous legal conclusion that they were not engaging in "retail sales" subject to the retail sales tax. *See Johnson v. Recreational Equip., Inc.*, 159 Wn. App. 939, 954, 247 P.3d 18 (2011) (legal conclusion is insufficient to raise a question of fact in summary judgment context). On the contrary, the undisputed facts in the record, which were provided through declarations and discovery responses by appellants, lead only to the conclusion that these two businesses were indeed engaging in retail sales subject to the retail sales tax.

Appellants' discovery responses and declarations explain the curious process they engaged in to appear in compliance with the letter of

the medical marijuana law. Because that law required that only "members" in a collective garden have access to marijuana, every customer was required to sign a membership agreement. *See, e.g.*, CP 320. And because the law allowed no more than 10 members at a time, customers were required to repeatedly join and resign membership as they entered the store to "contribute" money in exchange for marijuana, and then left the store with the marijuana for their personal use. *See id.* (explaining that every time a patient returns to the store, he or she must again formally "join" prior to gaining admittance to the medicine area of the garden). In essence, because the law at the time prohibited the commercial sale of marijuana, appellants engaged in a charade to avoid calling retail sales of marijuana what they were: retail sales.[5] But appellants admit facts that demonstrate retail sales occurred.

Once inside the "medicine area," patients selected from several different types of marijuana. CP 321. "Once the patient has selected medicine, they make an appropriate contribution to the garden." *Id.* The "appropriate contribution" is determined by reference to the price list on the menu for the different strains of marijuana. *See* CP 604-17 (price lists). Though declarations explain that some members contributed something

[5] The mere fact that Washington law did not permit the retail sale of medical marijuana at the time does not change those sales' taxable status in light of the fact that retail sales occurred. *See Nickerson v. Dep't of Rev.*, No. 48702-1-II, 2016 WL 6599651 (Wash. Ct. App. Nov. 8, 2016) (unpublished).

other than money, it is admitted that "[m]ost patients contribute money . . . ." CP 321. No allegation is made that the members, who repeatedly joined and resigned their memberships as they entered the retail establishment to "contribute" money in exchange for marijuana, had ownership interests in the business. Rather they were merely customers of a retail establishment.

The businesses were engaged in the retail sale of marijuana under the definition of "retail sale" in the tax code. As they admit, most patients selected the marijuana they wanted, and then contributed money in exchange. These contributions were based on a price list or menu. These were sales under RCW 82.04.040(1), which includes the transfer of ownership of personal property in exchange for any valuable consideration. The money exchanged for the marijuana was "valuable consideration." RCW 82.04.040(1). Accordingly, the businesses in this litigation all engaged in the sale of personal property at retail, and those retail sales were subject to retail sales tax unless an exemption applies.

Two of the appellants assert that rather than selling tangible personal property, they were instead "management companies" selling "services," and that none of those services were subject to the retail sales tax. Appellants' Br. at 10-11. The Department has never asserted that appellants engaged in services that were subject to the retail sales tax. The

Department has consistently maintained that appellants sold tangible personal property at retail. In essence, appellants assert that those members who came into the stores to purchase marijuana were not paying for the marijuana, but rather were paying for services related to operation of the garden. But a business cannot avoid collecting and remitting sales tax by creating documents or having customers sign agreements stating that they are buying services rather than goods. *See, e.g.*, *Wash. Imaging Servs., LLC v. Dep't of Rev.*, 171 Wn.2d 548, 556-57, 252 P.3d 885 (2011) (taxpayer's private contracts with another entity did not determine whether it earned gross income subject to Washington tax statutes); *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 43-44, 156 P.3d 185 (2007) (explaining that this Court focuses on the substance of a transaction, and has rejected the argument that a seller may avoid tax using a term in a contract to dictate where sales occur). Appellants, in substance, engaged in retail sales, and were required to collect and remit retail sales tax.

Appellants make a passing alternative argument that genuine issues of material fact exist as to whether they sold marijuana. Appellants' Br. at 12. But appellants do not identify what the disputed material facts are. Appellants made the same conclusory and unexplained argument in

briefing at the trial court.[6] CP 747. This Court need not address an argument not adequately developed in appellants' brief. *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990).

Even if the argument were adequately explained, there is no issue of material fact. The question of whether appellants engaged in "retail sales" under the tax statutes is a legal question. The issue is whether personal property was exchanged for valuable consideration. RCW 82.04.040(1). The only facts in the record on this point are declarations and discovery provided by appellants. There are no contradictory declarations provided by the Department. There is no dispute that customers paid money, and received marijuana in exchange. There is no dispute that the businesses had price lists that stated the appropriate price for each type of marijuana. There is no dispute as to the amounts of money upon which tax was paid and sought as a refund, which involved revenues in the hundreds of thousands of dollars. The only reasonable conclusion from the facts in the record is that appellants engaged in the retail sale of marijuana.[7] No material issue of fact exists.

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[6] Appellants appeared to disavow this assertion during the summary judgment oral argument, explaining, "[a]s the court just pointed out, both sides have moved for summary judgment. Both sides agree that these are legal issues." Verbatim Report of Proceedings at 4, Mar. 11, 2016.

[7] Granted, the record is thin as to how the businesses actually operated. But this is because appellants aggressively resisted any discovery whatsoever on the ground that the case involved legal, rather than factual issues. The trial court ordered appellants to produce some limited discovery, identifying just a few selected interrogatories and

The trial court properly granted summary judgment to the Department because appellants engaged in the retail sale of marijuana.

B. Marijuana Does Not Qualify For The Prescription Drug Sales Tax Exemption Because It Cannot Legally Be Prescribed.

Medical marijuana does not meet the statutory definition of a sales tax exempt prescription drug. Marijuana, even today, is a schedule I controlled substance under both federal and state law that cannot legally be prescribed.

The plain language of the prescription drug sales tax exemption does not exempt medical marijuana. First, marijuana is not "dispensed to patients, pursuant to a prescription." RCW 82.08.0281(1). Second, an authorization stating that an individual *may* benefit from medical marijuana is not an "order, formula, or recipe," and therefore is not a "prescription." RCW 82.08.0281(4)(a). Third, the tax exemption's requirement that a prescription be issued "by a duly licensed practitioner authorized by the laws of this state to prescribe" necessarily implies that the item being prescribed must be dispensed pursuant to a legally valid prescription. RCW 82.08.0281(4)(a). And even if the language were ambiguous, several canons of construction dictate that the Department's interpretation is correct.

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requests for production that appellants would be required to answer. *See* CP 1114-16. A trial on this issue would be futile, as appellants by their own description of their businesses describe activities that constitute "retail sales" under the tax law.

1. This Court construes a statute's plain language consistent with the legislative purpose.

The goal of statutory interpretation is to discern and apply the Legislature's intent based upon the statute's plain meaning. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). "The meaning of words in a statute is not gleaned from those words alone but from 'all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.' " *Burns v. City of Seattle*, 161 Wn.2d 129, 146, 164 P.3d 475 (2007) (citation omitted). The Court should avoid interpreting a statute in a manner that results in unlikely, absurd, or strained consequences. *G-P Gypsum Corp. v. Dep't of Rev.*, 169 Wn.2d 304, 313, 237 P.3d 256 (2010). If there is more than one reasonable interpretation of statutory language, "the court should construe the statute to effectuate the legislature's intent." *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). The interpretation that "better advances the overall legislative purpose should be adopted[.]" *Weyerhaeuser Co. v. Dep't of Ecology*, 86 Wn.2d 310, 321, 545 P.2d 5 (1976).

Reading the prescription drug sales tax exemption as a whole, it is plain that the Legislature intended only to exempt sales of drugs dispensed

pursuant to a valid prescription. It did not, as appellants assert, intend to exempt the sale of drugs that practitioners cannot legally prescribe.

2. The Court of Appeals in *Duncan* correctly held that sales of medical marijuana are not exempt prescription drug sales.

Division III of the Washington State Court of Appeals recently issued an unpublished decision on the primary legal issue in this case—whether the Legislature or the voters intended to create an exemption from sales tax for the sale of medical marijuana under prior law. *Duncan v. Dep't of Rev.*, No. 33245-4-III, 2016 WL 4413279 (Wash. Ct. App. Aug. 18, 2016) (unpublished).[8] The Court of Appeals agreed with the Department that the Legislature did not intend, through the prescription drug sales tax exemption, to exempt marijuana from sales tax. *Id.* at *1. The Court of Appeals pointed out that Ms. Duncan had conceded that a medical marijuana authorization is not a prescription under the controlled substance statutes. *Id.* at *3. The Court reasoned that this arrangement was no accident, as a physician who prescribed marijuana would violate federal law. *Id.*

The Court of Appeals concluded that Ms. Duncan's marijuana sales did not qualify for the prescription drug exemption for two reasons.

[8] Under GR 14.1, the Department cites the unpublished opinion in *Duncan* as nonbinding authority to be accorded such persuasive value as the Court deems appropriate.

The Court first analyzed the tax exemption's requirement that a prescription must be issued by a "duly licensed practitioner authorized by the laws of this state to prescribe." *Id.* at *3. The Court reasoned that the prescription drug exemption could not be read "in a vacuum." *Id.* at *4. The exemption applied only to drugs that are "dispensed to patients." *Duncan*, 2016 WL 4413279. No licensed practitioner can legally prescribe marijuana. *Id.* The Court would not overlook the absurdity of an interpretation that the Legislature "didn't care whether the prescription was illegal." *Id.* at *4.

The Court also reasoned that even if the statute were ambiguous, two principles supported the Department. *Id.* at *5. First, tax exemption statutes are construed strictly against the taxpayer. *Id.* at *4-5. Second, legislative history in 2004 supported the Department's position. *Id.* at *5.

The Court of Appeals held that there was a second, independently sufficient reason why the exemption did not apply. The statute requires a prescription to be an "order, formula, or recipe." *Id.* at *3. These terms were not defined in the statute, and the Court therefore turned to their technical meanings because the statute deals with the practice of medicine. *Id.* at *6-7. The medical marijuana documentation was not a command, instruction, or directive. *Id.* at *7. Therefore, medical marijuana sales were not tax exempt prescription drug sales. *Id.* at *7.

3. The prescription drug exemption requires a legal prescription.

Under RCW 82.08.0281, sales of prescription drugs dispensed to patients pursuant to a prescription are exempt from the retail sales tax.[9] Under federal and state law, marijuana is categorized as a schedule I controlled substance. 21 U.S.C. § 812(c)(10); RCW 69.50.204(c)(22). It therefore cannot legally be prescribed and does not qualify for the prescription drug exemption.

The prescription drug exemption dates back to 1974, well before any of Washington's recent laws taking a more tolerant view of marijuana.[10] The version of RCW 82.08.0281 in effect during the tax period contained several requirements to meet the prescription drug exemption:

> (1) The tax levied by RCW 82.08.020 shall not apply to sales of drugs for human use dispensed or to be dispensed to patients, pursuant to a prescription.
> . . .
> (4) The definitions in this subsection apply throughout this section.
> (a) "Prescription" means an order, formula, or recipe issued in any form of oral, written, electronic, or other means of

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[9] The parties in this matter agree that *Former* RCW 82.08.0281 (2004) is the version of the statute that was in effect at the time of the taxed activities and the version of the statute that applies. For ease of reference, and because the portions of the statute material to this dispute have not changed, the Department cites to the current statute.

The statutory definition of the term "drug" has changed, but the Department on appeal is not asserting the marijuana was not a "drug" as that term was defined under the 2004 version of the statute.

[10] Laws of 1974, ch. 185, § 1, originally codified as RCW 82.08.030(28).

transmission by a duly licensed practitioner authorized by the laws of this state to prescribe.

CP 594.

As a matter of law, the health care authorization for medical marijuana created by Initiative 692 was not a prescription, and the sale of medical marijuana was not exempt from retail sales tax as a sale of a prescription drug under RCW 82.08.0281.

Under the prescription drug sales tax exemption, the sale of drugs must be "dispensed to patients, pursuant to a prescription." RCW 82.08.0281(1). A "prescription" is an "order, formula, or recipe" and must be issued "by a duly licensed practitioner authorized by the laws of this state to prescribe." RCW 82.08.0281(4)(a). This exemption requires not only that the health care provider be licensed to prescribe generally, but that the provider has legal authority to prescribe the particular substance being prescribed. Reading the statute as a whole, it is clear that the Legislature intended to exempt only the sale of drugs that could legally be prescribed.

a. Patients are not "dispensed" medical marijuana pursuant to a prescription.

The tax exemption requires that patients be "dispensed" a drug, pursuant to a prescription. RCW 82.08.0281(1). The word "dispensed" is not defined in the prescription drug tax statute. However, the Washington

Uniform Controlled Substances Act does define the word "dispense." Where a statute does not define a term, it is appropriate to look to a definition in a related statute. *LaCoursiere v. Camwest Dev., Inc.*, 181 Wn.2d 734, 741-42, 339 P.3d 963 (2014). That Act defines "dispense" as

> the interpretation of a prescription or order for a controlled substance and, pursuant to that prescription or order, the proper selection, measuring, compounding, labeling, or packaging necessary to prepare that prescription or order for delivery.

RCW 69.50.101(j). Only pharmacists may "dispense" controlled substances under Washington law, except for certain circumstances when a practitioner can dispense the substances directly. RCW 69.50.308.

Because it is a schedule I controlled substance, marijuana cannot be dispensed, nor can it be prescribed. *See State v. Hanson*, 138 Wn. App. 322, 328-32, 157 P.3d 438 (2007) (rejecting argument that Initiative 692 implicitly repealed marijuana's classification as a schedule I controlled substance that cannot be legally prescribed by physicians). A pharmacist does not select, measure, compound, label, or package marijuana because the pharmacist cannot legally do so. Marijuana is not dispensed to patients pursuant to a prescription.

b. An authorization for medical marijuana is not an "order, formula, or recipe."

The tax definition of a "prescription" requires an "order, formula, or recipe." RCW 82.08.0281(4)(a). Before turning to the definitions of these words, it is instructive that some of the authorization forms in the record recognized and expressly stated that they were not prescriptions.

Several of these forms expressly state: "This is NOT a prescription for Medical Marijuana." CP 619, 620. Practitioners recognized that they were not issuing prescriptions for marijuana. The forms in the record illustrate some other common language used in authorizations. One form with Department of Health letterhead contained typical language:

> I have advised this patient about the potential risks and benefits of the medical use of marijuana. It is my professional opinion that this patient *may benefit* from the medical use of marijuana.

CP 621 (emphasis added).

Nothing in the authorizations constitutes an "order" that the patient consume marijuana or that a pharmacist dispense marijuana. And there is no formula or recipe indicated on the authorizations. Physicians are not advising patients, through the authorizations, as to the type of product, the manner in which to consume the product (i.e., edible or to be smoked), the quantity, or the dosage, each of which are elements of a prescription.

The authorization is simply a statement about a potential benefit, not a directive. Under both federal and state law, marijuana is a schedule I controlled substance. 21 U.S.C. § 812(c)(10); RCW 69.50.204(c)(22). Healthcare practitioners must obtain a special registration from the federal government to be authorized to prescribe a controlled substance. 21 U.S.C. § 822(a). Prescriptions cannot be issued for a schedule I controlled substance such as marijuana. *See id.* For other controlled substances, schedules II through V, licensed healthcare practitioners may issue prescriptions, but must do so according to stringent requirements. *See* 21 U.S.C. § 822(a); RCW 69.50.203(a)(2), (3); RCW 69.50.308.

Federal law requires that prescriptions for controlled substances contain the strength, dosage, quantity, and directions for use:

> All prescriptions for controlled substances shall be dated as of, and signed on, the day when issued and shall bear the full name and address of the patient, the drug name, strength, dosage form, quantity prescribed, directions for use, and the name, address and registration number of the practitioner.

21 C.F.R § 1306.05(a) (2015).

None of these requirements can be found in an authorization. The authorization simply indicates that the patient has been diagnosed with a serious medical condition, that the licensed practitioner has discussed the risks and potential benefits of the use of marijuana for a medical use, and

that the patient "may benefit" from using marijuana.[11] This does not constitute an order, formula, or recipe, and thus is not a prescription.

Appellants assert that authorizations "contain many of the characteristics of prescriptions . . . ." Appellants' Br. at 21. The Department disagrees with this conclusion, but in any event, it misses the point. The authorization form does not comply with federal law for prescriptions of controlled substances. And even if we supposed that the Legislature for some reason intended something less than compliance with these regulations to qualify a prescription for tax exempt purposes, an authorization does not meet definitions for an order, formula, or recipe.

Appellants do not contend that an authorization is a "formula" or "recipe." *See* Appellants' Br. at 21-22. They do, however, contend it is an "order" as that term is "plainly and ordinarily understood." Appellants' Br. at 21-22. There are numerous dictionary definitions for "order," but the one that appears the most on point is "to give orders to: COMMAND . . . : require or direct (something) to be done." *Duncan*, 2016 WL 4413279 at *6 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 1588 (1993)). An authorization commands nothing.

[11] The authorizations during the tax period can be contrasted to the new authorization in 2015 legislation, which specifies that recommended dosage should be included in the authorization. This new authorization form is more similar to a prescription, but the Legislature has expressly declared that it is still not a prescription. Laws of 2015, ch. 70, § 17; Laws of 2015, 2d Spec. Sess., ch. 4, § 101(b).

Division III correctly reasoned that because the term "order" was used in a technical sense, use of a technical or medical dictionary is appropriate. *Id.* at *6-7. The tax statute refers to prescriptions that are dispensed to patients who are authorized by law to prescribe. These are technical terms with technical meanings. The Court of Appeals relied on the following definition of "order":

> Instructions from a health care provider specifying patient treatment and care. A directive mandating the delivery of specific patient care services.

Id. at *6 (citing TABER'S CYCLOPEDIC MEDICAL DICTIONARY (22d ed. 2013)). An authorization does not specify treatment or care, is not a directive, and does not mandate delivery of specific care. It states that a patient has a condition, and includes a permissive and equivocal statement that a patient may benefit from marijuana. It is not an order. *See Duncan*, 2016 WL 4413279 at *7.

c. The prescription drug exemption requires that the practitioner be permitted to prescribe the item at issue.

Even if an authorization for marijuana were an "order," sales of medical marijuana are still not within the prescription drug exemption because the statute requires the drug to be issued through a legally valid prescription. This is the only reasonable construction of the statutory language. The statute requires that the prescription be issued by "a duly

licensed practitioner authorized by the laws of this state to prescribe." RCW 82.08.0281(4)(a). The definition does not state, expressly, what that practitioner must be legally authorized to prescribe. But the answer to this question is obvious. The only reasonable implication of the statute is that the practitioner must be permitted to prescribe the drug at issue. It makes little sense to read the sentence to mean that the practitioner need only be permitted to prescribe drugs in a general sense, without regard to whether this particular drug could legally be prescribed. Under this reasoning, a prescription for heroin or cocaine would be exempt as long as the doctor could legally prescribe other drugs. And it would mean that the prescription drug exemption would extend to purchases of marijuana from street dealers, and not merely from collective gardens, if authorized by a medical professional.

The sentence is, in a way, incomplete, and both appellants and the Department must attempt to complete the sentence in the way that best captures the Legislature's intent. Appellants would add to the sentence as follows: a prescription for a drug must be issued by "a duly licensed practitioner authorized by the laws of this state to prescribe [drugs generally, without regard to whether the law permits prescription of the particular item]." The Department would read the sentence to say: a prescription for a drug must be issued by "a duly licensed practitioner

authorized by the laws of this state to prescribe [the item being prescribed]." The Department cannot be accused of adding to the sentence because appellants must do exactly the same thing. The Department offers the only reasonable interpretation of the statute, in keeping with the obvious legislative purpose to exempt legally prescriptible drugs.

The Legislature did not expressly state that the prescription must be authorized by a practitioner to prescribe "the particular drug being prescribed," because to do so would have been superfluous. A doctor would not prescribe a substance without legal authority to do so, and if the doctor did violate the law by issuing an illegal prescription, the Legislature certainly would not have intended the sale of that drug to be tax exempt. A doctor would not, without violating the law and risking his or her license, prescribe an illegal drug or a drug on schedule I of the controlled substances list. The Legislature did not need to state the obvious, where the language of the statute necessarily implies that only legally valid prescriptions are exempt. Because marijuana cannot be legally prescribed, it cannot meet the definition of a "prescription."

d. Appellants' reading of the statute as permitting any drug to qualify as a prescription drug is unreasonable.

Plaintiffs assert that the definitions of "drug" and "prescription" do not, standing alone, expressly limit the tax exemption to drugs that are

legal to prescribe. This argument asserts that the definition of "drug" means any drug, and "prescription" simply refers to the person with authority to offer prescriptions. This reading is flawed and unreasonable.

This reading fails to read the words in the statute as a whole. *See Duncan*, 2016 WL 4413279 at *4 ("[w]e agree with the Board, however, that it is not reasonable to read the prescribed drug exemption in a vacuum"). Instead it extracts pieces of the statute and then pastes them back together, disregarding the context of the words:

> It is always unsafe to construe a statute or contract by a process of etymological dissection, and to separate words and then apply to each, thus separated from its context, some particular definition given by lexicographers, and then to reconstruct the instrument upon the basis of these definitions. An instrument must always be construed as a whole and the particular meaning to be attached to any word or phrase is usually to be ascribed from the context, the nature of the subject matter treated and the purpose or intention of the parties who . . . enacted or framed the statute or constitution.

2A Sutherland, *Statutory Construction* § 46.5 (7th ed. 2016) (citing *Addison v. Holly Hill Fruit Prods.*, 322 U.S. 607, 64 S.Ct. 1215, 88 L. Ed. 1488 (1944)).

The tax statute creates an exemption for drugs to be *dispensed* to *patients, pursuant to a prescription*. The statute also requires the prescription be an *order, formula, or recipe* by a practitioner authorized by *the laws* of this state *to prescribe*. This language requires that the substance must be one that such a practitioner can legally prescribe. It

would have made little sense for the Legislature to add another sentence or phrase stating that only legal drugs could be prescribed. References to the "laws of this state," and "to prescribe" plainly compel that the Legislature intended only to cover legally prescriptible drugs.

To hold otherwise would be, as the Court of Appeals correctly concluded in *Duncan*, to reach an absurd result:

> In carrying out our fundamental objective of ascertaining and carrying out the legislature's purpose, we cannot overlook the unlikelihood—indeed, the absurdity—that the legislature required a prescription to be issued by a "duly-licensed practitioner authorized by the laws of this state to prescribe" but didn't care whether the prescription was illegal.

Duncan, 2016 WL 4413279 at *4. Taken to its logical conclusion, plaintiffs would reason that any illegal drug—even drugs much more harmful than marijuana—could fall within the prescription drug exemption if prescribed by a licensed professional. This was not the Legislature's intent, when taking all the language in the statute in context and consistent with the purpose of the exemption. The Legislative purpose was to exempt sales of legally valid prescription drugs.[12]

[12] And when the 2015 Legislature exempted certain medical marijuana sales from sales tax, it stated unequivocally that authorizations for sales of medical marijuana were not "prescriptions." Laws of 2015, ch. 70, § 17.

e. Neither Washington nor federal law permits marijuana to be prescribed.

Understanding whether marijuana is "dispensed to patients, pursuant to a prescription," or whether an authorized practitioner is permitted "to prescribe" it, requires looking at federal and state law related to the prescription of controlled substances. Marijuana cannot meet this statutory exemption definition because health care providers cannot prescribe marijuana under the federal or state controlled substances acts.

The federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.*, categorizes drugs based upon their potential for abuse in five schedules called "controlled substances." Schedule II through schedule V all require a prescription. 21 U.S.C. § 829. Schedule I drugs are characterized as drugs with a high potential for abuse, have no currently accepted medical use in treatment, and lack safety for use of the drug. 21 U.S.C. § 812(b). Marijuana is a schedule I controlled substance. 21 U.S.C. § 812(c)(10).

Washington's Uniform Controlled Substances Act also classifies marijuana as a schedule I controlled substance, even today, after Initiative 502 legalized the sale of recreational marijuana under Washington law. RCW 69.50.204(c)(22). A health care practitioner must obtain a special registration from the federal government in order to be authorized to

prescribe a controlled substance. 21 U.S.C. § 822(a). Without a specific registration for controlled substances, no health care practitioner may issue a prescription. *Id.*; RCW 69.50.203(a)(2), (3); RCW 69.50.308. In fact, appellants do not even dispute that marijuana cannot be legally prescribed. *See* Appellants' Br. at 14-19.

This Court recognized that marijuana cannot be prescribed in *Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997). In *Seeley*, an individual challenged the state's listing of marijuana as a schedule I controlled substance as unconstitutional under Article I, sections 12 and 32 of the Washington Constitution. The Court upheld the Legislature's classification and held: "Marijuana cannot be legally prescribed, nor can a prescription for marijuana be filled by a pharmacist in Washington . . . ." *Id.* at 783. *Seeley* is still good law even after the various changes in Washington's marijuana law. Nothing about these changes has made it legal for physicians or others to prescribe marijuana in Washington. *See* Laws of 2015, ch. 70, § 17.

Initiative 692 created a process for medical authorizations rather than making marijuana a prescription drug. The difference was not semantic. States do not allow prescriptions for medical marijuana because strict federal law prohibits doctors from prescribing marijuana and other schedule I substances. It is unlikely doctors would risk their authority to

issue prescriptions by issuing prescriptions for drugs that are not legal to prescribe. So states have created statements like the ones in Washington that indicate that a patient has a particular medical condition and may benefit from use of marijuana, without issuing a prescription to the patient ordering a pharmacist to fill it. *Former* RCW 69.51A.010(7) (2010). A Colorado court ruled similarly. *Benoir v. Indus. Claim Appeals Office*, 262 P.3d 970, 973 (Colo. App. 2011) (explaining that under the Colorado Constitution, "a physician does not *prescribe* marijuana, but may only provide 'written documentation' stating that the patient has a debilitating medical condition and might benefit from the medical use of marijuana.").[13] The fact that people sometimes refer to "prescriptions" for medical marijuana in casual dialogue does not transform an authorization into a prescription. There is a substantive and legal difference.

The Washington State Medical Association and the Washington State Medical Quality Assurance Commission explicitly state that physicians

[13] The Colorado decision arose in the context of a claim for unemployment benefits by an employee discharged for the use of marijuana. The employee claimed the benefit of a law prohibiting the denial of unemployment compensation for the presence of "not medically prescribed controlled substances" in the worker's system during working hours. *Benoir*, 262 P.3d at 971-93. Colorado's provision is nearly identical to Washington's medical marijuana law. The court explained that marijuana, in contrast to schedule II through IV controlled substances that can be prescribed, "remains a Schedule I controlled substance under the applicable federal statute and consequently cannot be prescribed." *Id.* at 973-74. The court then concluded that the medical use of marijuana by an employee holding a registry card was not pursuant to a prescription and did not constitute use of medically prescribed controlled substances within the unemployment compensation statute. *Id.* at 974-75.

may not issue prescriptions for medical marijuana because to do so is illegal. Instead, the Washington State Medical Association provides a form for both patients and health care providers to effectuate the health care authorization for possession of marijuana for medical use. CP 663. The Medical Association advises its members:

> **Does this mean that physicians or the other licensed health care professionals may prescribe marijuana?**
>
> *No, physicians or the other authorized licensed health care professionals must not prescribe marijuana.* It is prohibited under *federal* law to knowingly or intentionally distribute, dispense or possess marijuana. . . . Violation of federal laws can bring significant penalties, including imprisonment and fines. In addition, violating federal law (or aid and abet in its violation) may result in other federal sanctions, such as a revocation of a health care provider's DEA registration.

CP 663.

Likewise, the Medical Commission advises physicians:

> **Is my recommendation considered a prescription if it is written on tamper-resistant paper?**
>
> Healthcare providers cannot write prescriptions for medical marijuana. They may only write recommendations that a patient has a medical condition that may benefit from the medical use of marijuana.

CP 668. As a matter of law, an authorization for medical marijuana is not a prescription. This is so not only under the tax law, but under laws governing healthcare professions as well.

f. Washington's medical marijuana initiative did not authorize prescriptions or make medical marijuana tax exempt.

Interpretation of a tax statute, like any other statute, is fundamentally a question of legislative intent. If appellants were correct that the voters intended medical marijuana to be sales tax exempt, one would have expected that the medical marijuana initiative would have mentioned that intention. But the initiative establishing medical marijuana made no mention of taxes whatsoever and the Legislature has since clarified that medical marijuana is not a prescription drug.

Initiative 692 nowhere stated that it was either creating a tax exemption for marijuana or that marijuana would be considered a prescription drug for sales tax purposes. CP 579-82. Tax exemptions must be expressly created by the Legislature or the People. *See TracFone Wireless, Inc. v. Dep't of Rev.*, 170 Wn.2d 273, 297, 242 P.3d 810 (2010) (intention to create a tax exemption "should be expressed in unambiguous terms" and "may not be created by implication").

Far from expressly creating a tax exemption for marijuana, Initiative 692 would not have given any voter a clue that marijuana, which could not even be legally sold commercially, would be exempt from sales tax as a prescription drug. Rather, appellants use a superficial similarity between medical marijuana authorizations and prescriptions for legally prescriptible

drugs as an after-the-fact justification to avoid taxes. That was neither the Legislature's intent in creating the prescription drug exemption, nor was it the intent stated in Initiative 692, which says nothing about medical marijuana being sales tax free.

4. Even if the tax exemption statute were ambiguous, the canons of construction still dictate that the Department should prevail.

Even if this Court concluded that RCW 82.08.0281 was ambiguous, there are still two reasons why the tax exemption for prescription drugs does not apply. First, the 2004 legislative amendment to the statutory definition of "prescription" indicates that insertion of the words "to prescribe" required the substance itself to be a legally prescriptible substance. Second, tax exemption statutes are strictly construed against the taxpayer.

a. Legislative history further supports the Department's conclusion.

Because the prescription drug statute unambiguously requires a legally prescriptible drug for tax preferred treatment, this Court need not look to legislative history. If the Court does look to the legislative history, however, that history supports the Department.

In 2004, the Legislature amended the definition of "prescription" due to the Streamlined Sales and Use Tax Agreement adopted into law in

2003. Laws of 2003, ch. 168, § 403. The Legislature added the words "to prescribe" to the end of the definition, so that the definition read:

> "Prescription" means an order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner authorized by the laws of this state *to prescribe*.

Laws of 2004, ch. 153, § 108 (emphasis added). The final bill report for the 2004 amendment explained the purpose of this amendment was to clarify that "[a] prescription for items or drugs that are exempt must be prescribed by a person whose license authorizes him or her to prescribe the item or drugs." Final Bill Report on S.B. 6515, 58th Leg. Reg. Sess., at 2 (Wash. 2004).

This history supports the Department's argument that the statutory definition of "prescription" requires that the practitioner be authorized to prescribe the drugs or devices referenced in the order. The legislative history made express what is strongly implied by the statutory language. Because marijuana cannot be prescribed pursuant to federal or state law, there is no exemption from sales tax for the sale of medical marijuana.

The Legislature's recent treatment of marijuana and taxation, while occurring subsequent to the tax period, also illustrates that when the Legislature wanted to address the issue, it did so explicitly. The Department will not repeat this history in detail, which is described in in

Section III.B above. In sum, the 2014 Legislature, likely in response to litigation over the prescription drug exemption, expressly clarified the prescription drug exemption by defining "drug" to specifically exclude marijuana. Laws of 2014, ch. 140, § 19. In 2015, the Legislature merged the medical and marijuana regulatory systems. In doing so, the Legislature expressly stated that authorizations were not prescriptions, made medical marijuana subject to a 37% excise tax, and exempted medical marijuana from the 6.5% state sales tax if certain conditions are met. Though the Legislature has changed the taxation of medical marijuana over time, it has consistently not considered medical marijuana a prescription drug.

b. Tax exemption statutes are construed against the taxpayer.

"Taxation is the rule and exemption is the exception." *Budget Rent-A-Car of Washington-Oregon, Inc. v. Dep't of Rev.*, 81 Wn.2d 171, 174, 500 P.2d 764 (1972). Tax exemptions are construed narrowly, and ambiguous exemptions are construed against the taxpayer. *Id.*; *Group Health Co-op of Puget Sound, Inc. v. Wash. State Tax Comm'n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967).

The Legislature has made a decision to tax most sales of tangible personal property, but to carve out an exemption for prescription drugs. That exemption should be no greater than what the Legislature has clearly

expressed. Therefore, if this Court concludes that the prescription drug exemption statute is ambiguous as to whether the drug itself must be legal to prescribe, or whether an authorization for medical marijuana is equivalent to a prescription, the exemption should be construed narrowly against the taxpayers.

C. Marijuana Is Not A Botanical Medicine That Naturopaths Can Legally Prescribe.

Just as physicians cannot prescribe marijuana, neither can naturopaths. Therefore, for similar reasons as described in section B above, a similar tax exemption for medicines prescribed by naturopaths does not exempt sales of marijuana.

In 1987, the Legislature began regulating and licensing naturopaths. RCW 18.36A. "The practice of naturopathic medicine includes . . . the prescription, administration, dispensing, and use . . . of . . . naturopathic medicines . . . ." RCW 18.36A.040. RCW 18.36A.020(10) defines the term "naturopathic medicines" as:

> [V]itamins; minerals; botanical medicines; homeopathic medicines; hormones; and those legend drugs and controlled substances consistent with naturopathic medical practice in accordance with rules established by the board. Controlled substances are limited to codeine and testosterone products that are contained in Schedules III, IV, and V in chapter 69.50 RCW.

As discussed above, federal and state law classify marijuana as a

schedule I controlled substance. 21 U.S.C. § 812(c)(10); RCW 69.50.204(c)(22). Consistent with this classification, RCW 18.36A.020(10) limits the legend drugs and controlled substances a naturopath may prescribe to certain schedule III, IV, and V substances as permitted by rules of the state board of naturopathy. The statute does not permit naturopaths to use schedule I or II legend drugs or controlled substances in their practice, nor does it permit naturopaths to use controlled substances not approved by the board of naturopathy in their practice. This statute makes a clear distinction between impermissible controlled substances, such as marijuana, which are not included as "naturopathic medicines," and permissible "naturopathic medicines," including, among other substances, "botanical medicines." Under RCW 18.36A.040 and 18.36A.020(10), naturopaths cannot prescribe, administer, dispense, or use medical marijuana in their practice since it is a schedule I controlled substance.

In 1998, the Legislature created a sales tax exemption for certain medicines prescribed by naturopaths in their practice. RCW 82.08.0283(1) states that the retail sales tax shall not apply to the sale of:

> (b) Medicines of mineral, animal, and botanical origin prescribed, administered, dispensed, or used in the treatment of an individual by a person licensed under chapter 18.36A RCW . . . .

By tightly limiting the controlled substances that naturopaths could prescribe under RCW 18.36A, it is clear that the Legislature did not intend to create a sales tax exemption for other non-prescriptible substances.[14] Nor can a licensed naturopath administer, dispense, or use marijuana to treat individuals. RCW 18.36A.040 limits these specific activities to those involving "naturopathic medicines." As described above, marijuana is not a "naturopathic medicine." *See* RCW 18.36A.020(10).

The medicines referred to in RCW 82.08.0283(1)(b) should be harmonized with those referenced in RCW 18.36A.020(10). *See ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993) ("[s]tatutory provisions must be read in their entirety and construed together, not piecemeal."). RCW 82.08.0283(1)(b) specifically refers to items administered, dispensed, or used in the treatment by a naturopath under RCW 18.36A, and that chapter specifically limits the term "naturopathic medicines" to certain medicines, excluding most controlled substances. Medical marijuana is classified as a controlled substance, which is treated separately from the naturopathic medicines described in RCW 18.36A.020(10). This interpretation best harmonizes RCW 18.36A,

[14] Later that year, the voters passed Initiative 692. At that time, the authorizations permitted by Initiative 692 were limited to physicians and did not permit naturopaths to issue authorizations. Laws of 1999, ch. 2, § 6. Only in 2010 did naturopaths become able to issue an authorization for medical marijuana, though they still cannot prescribe marijuana. Laws of 2010, ch. 284, § 2.

which regulates naturopaths, and RCW 82.08.0283, which exempts from sales tax certain medicines prescribed by naturopaths who are licensed under RCW 18.36A. Therefore, the sales of medical marijuana do not qualify for the sales tax exemption under RCW 82.08.0283.[15]

V. CONCLUSION

Because appellants provided marijuana in exchange for money, they engaged in "retail sales" subject to the retail sales tax, absent an applicable exemption. And because the Legislature intended to exempt only drugs that were legal to prescribe, the cited exemptions do not apply to appellants' marijuana sales. This Court should affirm.

DATED this 16th day of December, 2016.

ROBERT W. FERGUSON
Attorney General

JOSHUA WEISSMAN, WSBA No. 42648
Assistant Attorney General
DAVID M. HANKINS, WSBA No. 19194
Senior Counsel
Attorneys for Respondent
OID No. 91027

[15] If the Court disagreed, appellants would still need to prove that the marijuana provided to their customers in this case was actually authorized by naturopaths. Plaintiffs provided estimates of the percentage of their customers in discovery who received authorization for marijuana use from naturopaths, but these facts have not been proven.

PROOF OF SERVICE

I certify that I served a copy of this document, via email and U.S. mail, on the following:

Jay Berneburg
The Law Office of Jay Berneburg
705 S 9th St., Suite 206
Tacoma, WA 98405
jay@notguilty.com.bz
Kym@notguilty.com.bz

Darrell L. Cochran
Kevin M. Hastings
Christopher E. Love
Pfau Cochran Vertetis Amala, PLLC
911 Pacific Ave., Suite 200
Tacoma, WA 98402
darrell@pcvalaw.com
kevin@pcvalaw.com
chris@pcvalaw.com
laura@pcvalaw.com

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16th day of December, 2016, at Tumwater, WA.

Jessica Buswell, Legal Assistant

ATTORNEY GENERAL'S OFFICE - REVENUE & FINANCE DIVISION

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